hearing on all of his claims. Critically the Magistrate Judge found petitioner was not mislead where it held out the prospect of post-exhaustion federal review despite the fact review was in fact time-barred under AEDPA.

The district court addressed that issue only in passing. Instead, it used this case as a vehicle for a far broader argument: that it did not need to apprise petitioner of his options with respect to his mixed petition including the option to stay. Critically, the issue turns not on the court's advisements as the district court characterized the issue, but on the court's failure to sua sponte stay particularly where, as here, the failure to do so would result in a forfeiture of petitioner's right to federal writ review.

Finally a COA should be granted for consideration of equitable tolling. The court of appeals did not rule on whether petitioner was entitled to relief under equitable tolling principles, though it implied – correctly – that he would be. The conditions of petitioner's injury and hospitalization, deprivation of his legal materials, the Warden's successive failure to serve petitioner's exhaustion petition upon the California Supreme Court, and the ensuing periods during which he was prevented from discovering vital information bearing on the pendency of his case in that court were circumstances beyond his control, and he was entitled to equitable tolling regardless of when during the intervening period those conditions obtained.

In a case the district court failed to consider, the Ninth Circuit, sitting *en banc*, held that it is irrelevant whether a party entitled to equitable tolling could have filed his pleading within the time remaining in the limitation period. A test that requires such a showing, that court held, is "needlessly difficult to administer, runs counter to

Supreme Court precedent, and undermines the policy objectives of the statutes of limitations." *Id.* at p. 1195.

The district court held that petitioner's involuntary separation from his legal materials, hospitalization, convalescence, and the state's failure to serve the petition did not make it "impossible" for him to file a timely petition in the state court because he did not commence the exhaustion process until a ear after the district court dismissed his first petition. The impossibility test is wholly without foundation and at odds with the traditional test for equitable tolling in other civil action contexts. Moreover, equitable tolling in habeas cases has been allowed by this Court when it was in fact *not* "impossible" for the petition to have been filed on time. Accordingly, a COA should be granted to permit the Court to determine whether habeas petitioners must meet a different and more exacting standard than any other litigant to qualify for equitable tolling.

1. Legal Standard

Under 28 U.S.C. § 2253(c), a certificate of appealability may issue upon the "substantial showing of the denial of a constitutional right." The petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) *quoting Barefoot v. Estelle*, 463 U.S. 880, 893 and n.4 (1983). Petitioner need not show that he should prevail on the merits; he need only show that the issue is not frivolous, affording habeas petitioners an "opportunity to persuade

[the appellate court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir.2000).

2. Petitioner's Case Merits Appellate Review

A. Stay and Abeyance

In *Rose*, 455 U.S. 509 this court held that a "mixed" petition, that is, a petition raising both exhausted and unexhausted claims, should be dismissed "without prejudice," leaving the prisoner with the *choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court. *Id.* 514, 520.

In *Rose*, a pre-AEDPA decision, this Court anticipated its rule of exhaustion had the potential to be exercised in a manner that was unfair, with a resultant loss to a prisoner of his right to federal habeas review. As a result, it entered a rare admonition, cautioning district courts that such dismissals must be accomplished in a manner that "*does not unreasonably impair the prisoner's right to relief.*" *Rose*, 455 U.S. at p. 522, italics added.

Rose thus makes explicit that what this Court wanted to achieve, and what the AEDPA now reinforces, *see* 28 U.S.C. § 2254(b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims without expense to a prisoner's right to collateral review. This is not a matter of speculation. When afforded the opportunity, this Court has consistently construed governing habeas law in a manner designed to protect a prisoner's right to habeas review. *See Stewart v. Martin-Villareal*,

523 U.S. 637, 643 (1998) ("Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied" and a habeas petitioner may return to federal court.) *Id.* at 644. "To hold otherwise, would mean that a dismissal of a first petition for technical procedural reasons would bar a prisoner from ever obtaining federal habeas review." *Id.* at 645; *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion"; *Felker v. Turpin*, 518 U.S. 651, 663-664 (1964) ("There may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective").

In two recent cases, this Court assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and this Court has interpreted statutory ambiguities accordingly. In *Stewart*, 523 U.S. 637, this Court held that a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by § 2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id.* at 645. And in *Slack v. McDaniel*, this Court held that a federal habeas petition filed after dismissal of an initial filing for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" become a "'trap'" for "'the unwary pro se prisoner.'" 529 U.S. at 487 (*quoting Rose*, 455 U.S. at 520). Making the same assumption here, would militate in favor of stay procedures for federal habeas petitions.

In deciding it had no sua sponte duty to stay petitioner's unexhausted claims and that petitioner was not

mislead by the "without prejudice" dismissal, the district court barred petitioner, who simply followed the options he was given, from raising the exhausted claims asserted in his initial petition as well as the nonfrivolous claims developed in the second state exhaustion proceeding contemplated by the *Rose* dismissal, though a federal court had yet to review a single constitutional claim. This result is contrary to this Court's admonition that the complete exhaustion rule is not to "trap the unwary pro se prisoner." *Ibid.*, internal quotation marks omitted. *Slack*, 529 U.S. at 487.

There is no question district courts have the inherent authority to issue stays in proceedings before them. *See Rhines v. Weber*, 125 S.Ct. 1528, 1534, 161 L.Ed.2d 440 (2005); *Landis v. North American Co.*, 299 U.S. 248 (1936); *Arkadelphia Co. v. St. Louis Southwester Ry. Co.*, 249 U.S. 134, 146 (1919) (The power to stay proceedings is "inherent in every court" so long as it retains control of the subject matter and of the parties); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 381 (1935) (The authority to stay proceedings is appropriately used "to control the progress of the cause so as to maintain the orderly processes of justice"; *Duncan*, 533 U.S. at 182-83 ("in a post-AEDPA world, "there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies").

In the present case the district court concluded that it was not clear that a district court is required to raise the possibility of a stay sua sponte. Pet. Appx. at 13, Report at p. 13. This, of course, is contrary to *Rhines* of which the court had the benefit, and the host of authorities from the circuit courts, including the Ninth which had approved a

stay in cases like petitioner's where an outright dismissal "could jeopardize the timeliness of a collateral attack." *Zarvela v. Artuz*, 254 F.3d 374, 380 (2nd Cir.2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.2000); *Kelly v. Small*, 315 F.3d 1063 (9th Cir.2003); *Calderon v. United States District Court*, 134 F.3d 981, 986-88 (9th Cir.1998); and *see Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 2130, 150 L.Ed.2d 251 (2001) (Court ruled the court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition.)

The stay-and-abeyance procedure approved by *Rhines*, 125 S.Ct. 1528 and *see Kelly*, 315 F.3d 1063 applies retroactively. *See Brecht v. Abrahamson*, 507 U.S. 619, 631-32, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (retroactively applying new and more encompassing definition of harmless error in habeas cases); *see also McCleskey v. Zant*, 499 U.S. 467, 497-50, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In light of the holding in *Rhines* and *Kelly*, the district court erred when it found it lacked the authority to stay petitioner's mixed habeas petition sua sponte.

The court also concluded, erroneously, that petitioner failed to establish that a stay would have been warranted under *Rhines*, 125 S.Ct. at pp. 1534-35. Pet. Appx. at 15-16. The reasons cited were that petitioner failed to show good cause for his failure to exhaust and that his return to state court was not accomplished expeditiously. The district court's failure to make an adequate inquiry into these issues prevented the court from being able to determine whether petitioner met the circumstances for stay and abeyance. *Rhines*, 125 S.Ct. 1534. Further, it was not until *Rhines* that this court established time limits for the

right of return. Thus, to hold petitioner to a standard that did not even exist at the time his initial petition was dismissed, was in and of itself, unreasonable, violative of the ex-post facto clause of the United States Constitution.

Because petitioner's initially filed petition was timely when filed and should have been stayed, subject to appropriate conditions and because his trip to and from the state courts satisfied the conditions that should have been included in a stay, the initial petition should have been considered on its merits.

Finally, even assuming the court properly determined that stay and abeyance was inappropriate, a COA should have been granted as to the issue of whether the district court abused its discretion when it failed to allow petitioner upon remand to delete the unexhausted claims and to proceed with the exhausted claims particularly since it knew dismissal of the entire petition jeopardized petitioner's right to obtain federal writ relief on his exhausted and meritorious claims. *See id.* at 520, 71 L.Ed.2d 379, 102 S.Ct. 1198 (plurality opinion) ("[A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims"); *Rhines*, 125 S.Ct. at p. 1535 ("If a petitioner presents a district court with a mixed petition . . . the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief.") citing *Rose*, 455 U.S. at 520.

In view of these authorities, petitioner has made a "'substantial showing of the denial of a constitutional

right,'" *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *quoting* 28 U.S.C. § 2253(c), and has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The COA should have been granted to determine if a stay was warranted under *Rhines*, 125 S.Ct. at pp. 1534-35.

B. Petitioner Was Mislead

Petitioner filed a timely habeas petition which included exhausted as well as unexhausted claims. Following the only procedure of which he was aware, he relied on the district court's assurances that dismissal would be "without prejudice," elected to dismiss, pursued his state post-conviction remedies, and returned to federal court after fully exhausting his state claims, only to find he was time barred.

While the district court found petitioner was not mislead by the without prejudice dismissal, Pet. Appx. at 10, other courts have noted the deceptive nature of a dismissal without prejudice when the claims dismissed are time-barred. In *Rodriguez v. Bennett*, 303 F.3d 435 (2nd Cir.2002), the Second Circuit explained that for a petitioner dismissed 'without prejudice' after a year in federal habeas proceedings, the 'without prejudice' provision was an illusion; petitioner could never succeed in timely refiling the petition because he would already be time-barred. *Id.* at p. 439.

The same holds true here. *Rose* plainly commands that a prisoner be given "*the choice* of returning to state court to exhaust his claims or amending or resubmitting

the habeas petition to present only exhausted claims to the district court." *Rose*, 455 U.S. at 501, italics added. There was no question petitioner was entitled under *Rose* to withdraw his unexhausted claims and to proceed with his exhausted claims. However, that choice was meaningful only if petitioner, who was proceeding pro se, was aware that his other "choice", dismissal of the entire petition for complete exhaustion would preclude federal habeas review because the AEDPA limitations period had already run. This conclusion is not altered by the fact the district court told petitioner that a *future* federal petition might be time barred by the statute of limitations, indeed, the advisement itself was misleading for it implied the time had not *yet* run. Moreover, at the time the information was provided, AEDPA's one-year statute of limitations had already run, and thus barred petitioner from ever returning to federal court after exhausting the previously unexhausted claims in state court.

Obviously the choices offered, were not real choices at all, which leads to another point; the district court erred when it concluded petitioner was not entitled to relief for the improper dismissal of his first petition. The magistrate judge gave petitioner who was proceeding pro se, what was in effect a Hobson's choice: either withdraw his unexhausted claims and proceed only on the exhausted ones, or to dismiss his petitions in their entirety and "without prejudice" so he could return to state court and exhaust his then-unexhausted claims. But at the time the AEDPA's limitation period had already expired by more than five months, so, absent equitable tolling, federal review of *all* of petitioner's claims, including those already exhausted, were barred if he chose to dismiss. The district court's offer of dismissal "without prejudice", definitively, although not

intentionally, misled petitioner into believing dismissal for complete exhaustion was a viable alternative to proceeding with his exhausted claims, when it in fact it was not.

Peculiarly, the district court found that petitioner allowed sixteen months, longer than the one year limitation period of which he was warned to pass before attempting to exhaust claims that he knew were unexhausted. Pet. Appx. at 12-13. However, at the time the first petition was dismissed, the one year period had already lapsed, and the petition was already time barred absent equitable tolling.

In view of these facts, the COA should have been granted as to the issue of whether the district court's dismissal of the petition was erroneous and merits appellate review.

C. Discretionary Tolling on Equitable Grounds

Tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the one-year interval prescribed by AEDPA. *Duncan*, 533 U.S. at p. 183. The district court concluded equitable tolling was not available, because petitioner neither failed to pursue his state remedies with maximum expedition or to show that extraordinary circumstances beyond his control made it impossible to refile his federal petition earlier. Pet. App. at 20. As a basis for invoking equitable tolling, petitioner alleged he was bitten on the chin and hospitalized, lost access to his legal materials, and on two different occasions found, in response to his written inquiries, that his petition for a writ of habeas corpus given to prison officials to file in the

California Supreme Court had not in fact been filed and no action was pending. Pet. Appx. at 13 at fn. 7, 19. The court found these allegations were insufficient to warrant equitable tolling, but even assuming they were extraordinary circumstances which prevented him from filing the petition, it delayed it by only 69 days,[1] which nonetheless left him with the better part of a year in which he could have exhausted his unexhausted claims. Pet. Appx. at 20.

First, nothing in the court's order set a time-table for exhaustion and it was not until this Court's decision in *Rhines* that the court ruled the defendant must complete exhaustion within a specified time frame. Based on the law existing at the time, the district court did not condition petitioner's right of return on his pursuing state court remedies within any time frame, nor did it specify that he return to state court within a specific time after state court exhaustion was completed. Therefore a COA should issue if for no other reason on the constitutional question of whether the court's retroactive application of *Rhines* to petitioner's detriment is contrary to the ex-post facto clause of the United States Constitution.

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[1] Petitioner did not dispute the 69-day figure, and the district court relied on it in its report, but it is more likely that petitioner was in fact without his legal materials for a longer period than stated, and that the period during which he was lulled into believing, mistakenly, that his writ petition – twice given to prison officials for filing but was not filed – was pending in the California Supreme Court when in fact it was not, extended this period even longer. He also may be entitled to a longer period of equitable tolling because of other factors beyond his control, due to the Wardens' failure to deliver outgoing legal mail, and his inability to use the prison's law library. Cf. *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir.2000) (*en banc*) (per curiam).

Second, there is no evidence in the record which rebuts petitioners allegations. While facts yet to be developed may bear on petitioner's claim that the above-stated impediments "prevented" him from exhausting his petition for a period even more extensive than the 69 days calculated by the court, and also on the question of whether petitioner, by filing his second petition on September 8, 2000, filed soon enough, on this record the district court should have denied the respondent's motion to dismiss. Respondent made no showing that petitioner engaged in "intentionally dilatory litigation tactics," *Rhines, ante*, at ___, 161 L.Ed.2d at 452. As Justices Souter, Ginsberg and Breyer noted in their concurring opinion in *Rhines*, "the trickiness of exhaustion determinations promises to infect issues of good cause when a court finds a failure to exhaust; pro se petitioners (as most habeas petitioners are) do not come well trained to address such matters. *Rhines, ante* at ___, 161 L.Ed.2d at 453. Nor is the reference to "good cause" for failing to exhaust state remedies more promptly, *ante*, at ___, 161 L.Ed.2d at 452, intended to impose the sort of strict and inflexible requirement that would "'trap the unwary *pro se* prisoner.'" *Rhines, ante* at ___, 161 L.Ed.2d at 453 (concurring opn. Stevens, Ginsberg and Breyer) citing *Rose*, 455 U.S. at p. 520; *see also Slack*, 529 U.S. at p. 487. Despite this Court's admonition, that is exactly how it worked in application here. Thus COA should issue as to the reasonableness of the court's conclusion that petitioner failed to expeditiously exhaust state remedies.

Third, even applying a standard of good cause, what the district court failed to consider and what is undeniably relevant is that the timeliness rules for California's collateral review process are indeterminate. *Carey v. Saffold*,

536 U.S. 214, 223, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002). This inevitably effects the question here, of whether petitioner proceeded with due haste to exhaust his claims and return to federal court. "The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (*i.e.*, a filing in a higher court) comes too late. But it is the State's interests that the tolling provision seeks to protect, and the State, through its Supreme Court decisions or legislation, can explicate timing requirements more precisely should that prove necessary. *Id.* Given that AEDPA's tolling rule applies to the intervals between a lower court decision and a filing of a new petition in a higher court, *Duncan*, 533 U.S. at pp. 181-82, it remains to ask whether petitioner delayed "unreasonably" in seeking California appellate court review.

Petitioner filed his habeas petition in the California Court of Appeal fourteen months after judgment was entered dismissing his petition without prejudice. The district court found petitioners failure to diligently exhaust his claims and return to federal court precludes equitable tolling. Pet. Appx. at 20. The conditions of petitioner's injury and hospitalization, deprivation of his legal materials, the Warden's repeated and successive failure to effectuate service of petitioner's petition upon the California Supreme Court, and the Court's ensuing delay in notifying petitioner of the status of his case were circumstances beyond his control, and he was entitled to equitable tolling regardless of when during the intervening period those conditions obtained.

What the district court failed to consider is that Supreme Court and Ninth Circuit precedent establish that

an event which equitably tolls a statute of limitation stops the clock until the condition creating the need for equitable tolling dissipates, permitting the statute to resume running, regardless of when during the statutory period the event giving rise to equitable tolling occurred. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 561 (1974); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 435, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1194 (9th Cir.2001); *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1138 (9th Cir.2001) (*en banc*); *Supermail Cargo Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir.1995); *see also Capital Tracing Inc. v. United States*, 63 F.3d 859, 863 (9th Cir.1995).

No one disputes that petitioner was effectively denied at least 69 days of time. The district court's only finding was that even allowing for 69 days of impediments, he still did nothing for more than a year to exhaust his claims. Pet. Appx. at 20. As a discretionary doctrine equitable tolling turns on the facts and circumstances of a particular case and does not lend itself to bright-line rules. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999); *accord Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir.2000); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir.2000). Inapposite to the district court's ruling, the notion that the merits of an equitable tolling claim depend on when during the exhaustion period the equitable tolling occurred was rejected by the Ninth Circuit Court's *en banc* opinion in *Socop-Gonzalez*.

In that case, Mr. Socop-Gonzalez, an alien, had 90 days in which to file a motion to reopen his deportation proceedings before the Board of Immigration Appeals. Because of incorrect advice from an INS officer, however, he withdrew his appeal of the deportation order. Between

May 5, 1997, when the BIA returned the case to the Immigration Court, and July 7, 1997, when he received a letter instructing him to report for deportation (a period of 63 days), Mr. Socop-Gonzalez had no reason to believe that his deportation order had become effective. The Ninth Circuit Court of Appeals, sitting *en banc*, upheld his claim of equitable tolling.

First, the Ninth Circuit applied traditional principles of equitable tolling, which cover situations where "despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim." *Id.* at 1193 (internal quotations omitted).

Mr. Socop-Gonzalez met the standard for equitable tolling because he was prevented "*during this period* [i.e., the 63 days]" from discovering the vital information necessary for him to file a motion to reopen.

By the same token, tolling should apply during the entire period petitioner believed his petition was pending in the California Supreme Court, and during the period he was prevented from discovering vital information necessary for him to refile the petition. The district court however, failed to do so here, giving petitioner credit for 24 days representing only the time he was trying to obtain information bearing on the pendency of the action, but giving no credit for the time he was falsely lulled into believing the petition was pending.

Additionally, and of crucial relevance to this case, this Court rejected the government's contention that in determining whether a litigant was entitled to equitable tolling, a court had to "further inquire whether he reasonably could have been expected to file his motion to reopen

within the twenty-seven days remaining in the limitations period." *Id.* at 1194. This approach was rejected for three reasons. First, it had already been rejected by this Court in *Burnett and American Pipe & Construction*, and was inconsistent with prior holdings of this Court in *Daviton* and *Supermail Cargo*. The *Socop-Gonzalez* court observed that the this approach is

> needlessly difficult to administer, runs counter to Supreme Court precedent, and undermines the policy objectives of the statutes of limitations. [¶]. . . . The [proposed approach] does away with the major advantages of statutes of limitations: the relative certainty and uniformity with which a statutory period may be calculated and applied. *Id.* at 1195.

Finally, the Court held in *Socop-Gonzalez* that to make the validity of an equitable tolling claim dependent on the vagary of when during the statutory period the equitable tolling occurred would trump the clearly expressed Congressional policy of permitting plaintiffs to take the specified amount of time to further investigate their claims and consider their options before deciding whether to file suit: While a trial court may, in its discretion decide whether or not a particular fact situation warrants the use of its equitable powers to toll a limitation period, once it accepts a claim that circumstances justify equitable tolling, it may not substitute its own subjective view of how much time a plaintiff reasonably needed to file suit. In other words, a court may not usurp Congress's role by holding that even though, as a result of equitable

tolling, the claimant had less time than the statute allowed, the claimant had sufficient time to file the action. *Id.* at 1196.[2]

The district court here followed the discredited approach to equitable tolling. The district court's error appears to be caused by its reliance on a test for equitable tolling that was first framed by a district court in *Forti v. Suarez-Mason*, requiring "extraordinary circumstances outside plaintiff's control [that] make it impossible for plaintiff to timely assert his claim." 672 F.Supp. 1531, 1549 (N.D. Cal.1987).

In *Forti*, the district judge stated that federal courts applied a theory of equitable tolling "similar to an 'impossibility' doctrine," citing two cases: one holding that a plaintiff's internment by Japan during World War II tolled the limitation period on his Jones Act claim, *Osbourne v. United States*, 164 F.2d 767 (2d Cir.1947), and the other holding that the Civil War tolled the limitation period for a breach of contract claim. *Hanger v. Abbott*, 73 U.S. [6 Wall.] 532 (1867).

Neither of those cases, however, uses the term "impossible," nor did those courts purport to limit tolling only to circumstances arising out of the cataclysmic upheavals caused by war. In *Forti* itself, where the plaintiffs were seeking damages for injuries sustained during Argentina's "dirty war" of the mid-1970's, the court denied a motion to dismiss, holding that while the plaintiffs had not alleged they were "*actually* denied access to the Argentine courts,"

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[2] Two judges dissented from the majority opinion, but not on this ground. *See Socop-Gonzalez*, 272 F.3d at 1197 O'Scannlain, J., dissenting, joined by Silverman, J.

they might yet prove their "inability to gain *effective* access" to those courts. *Id.* at 1550 (emphasis added).

Thus, the court's holding belies its framing of the test in terms of "impossibility."

Similarly, a close examination of Ninth Circuit habeas decisions quoting the *Forti* test and permitting equitable tolling reveals that it was not in fact "impossible" for the petitions in those cases to have been timely filed. For example, in *Beeler*, the court-appointed attorneys for a capital petitioner were ordered to file a habeas petition by March 25, 1997, but at some point (unspecified in the opinion), the lead attorney accepted employment out of state and was permitted to withdraw. The second attorney was promoted to lead counsel and another attorney was appointed as second chair. On February 3, 1997, these attorneys asked the district court in advance to equitably toll the statute, which it did, giving them, in effect, an extension until October 13, 1997 to file the petition. This Court affirmed and, while quoting the "impossib[ility]" language of *Forti* as the applicable test, its holding simply noted that "much of the work product [the departing attorney] left behind was not usable by replacement counsel – a turn of events over which Beeler had no control." 128 F.3d at 1298.

Surely, it was not *impossible* for two experienced capital attorneys to file a habeas corpus petition on any date earlier than October 13, 1997.

In summary, under the controlling cases of *Burnett* and *Socop-Gonzalez*, the district court erred in concluding that petitioner was not entitled to equitable tolling, and its

judgment should be reversed.[3] For these reasons, petitioner has made a "'substantial showing of the denial of a constitutional right,'" *Miller-El*, 537 U.S. at p. 336, *quoting* 28 U.S.C. § 2253(c), and has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at p. 484. The COA should have been granted to reaffirm the traditional test for equitable tolling and clarify that it applies to habeas corpus proceedings as it does in all other civil law contexts.

CONCLUSION

Petitioner was convicted of spousal rape, forcible oral copulation, false imprisonment by violence, first degree residential burglary, kidnapping, sexual battery, unauthorized entry of property, and forcible sexual penetration by a

[3] Also, the district court failed to apply a reverse mailbox rule under which tolling continues until the time the prisoner receives actual notice of the state court's habeas denial. *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir.2002), as amended, 2002 U.S. App. LEXIS 2169 (Feb. 8, 2002); *Smith v. Duncan*, 274 F.3d 1245, 1249 (9th Cir.2001); *Jorss v. Gomez*, 266 F.3d 955, 957 (9th Cir.2001); *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir.2001).

The reverse mailbox rule applies here because conditions analogous to those that led to the adoption of the mailbox rule are present: the prisoner is powerless and unable to control the time he receives delivery of documents from the court. Although the state supreme court denied his habeas petition on August 30, 2000, it is unknown when petitioner received the denial of his habeas petition from prison authorities. Because that date is used as a surrogate for the date the California Supreme Court issued its order, tolling should perdure, under Rule 6(a), Federal Rules of Civil Procedure, until the day after receipt. However, petitioner was afforded no "credit" for this interval, another misapplication of the doctrine by the district court.

forcible object, for which he was sentenced to a term of 22 years in state prison. His petition presents serious constitutional claims that call into question the validity of the criminal proceeding leading to his conviction. Although the district court rejected his claims on timeliness grounds, it is not frivolous, and petitioner is entitled to a certificate of appealability to pursue appellate review of that denial.

For the foregoing reasons, Richard Kleinhammer, respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

LISA M. BASSIS
Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD WILLIAM KLEINHAMMER, Petitioner-Appellant, v. ERNEST ROE, Warden, California State Prison, Respondent-Appellee.	No. 05-55991 D.C. No. CV-00-11179-WJR Central District of California, Los Angeles ORDER (Filed Sep. 9, 2005)

Before: PREGERSON and THOMAS, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RICHARD KLEINHAMMER, Petitioner, v. ERNEST ROE, Warden, Respondent.	Case No. CV 00-11179-WJR (AJW) REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (Filed May 10, 2005)

Background

On December 22, 1994, petitioner was convicted of spousal rape, forcible oral copulation, false imprisonment by violence, first degree residential burglary, kidnaping, sexual battery, unauthorized entry of property, and forcible sexual penetration by a foreign object. [Motion to Dismiss, Ex. A]. He was sentenced to state prison for a term of 22 years. [Motion to Dismiss, Ex. A].

Petitioner appealed to the California Court of Appeal, which affirmed his conviction and sentence on April 15, 1997. [Motion to Dismiss, Exs. B & C].

Petitioner's petition for review filed in the California Supreme Court was denied on July 30, 1997. [Motion to Dismiss, Exs. D & E].

On July 24, 1998, petitioner filed a petition for a writ of habeas corpus in this Court. *Kleinhammer v. Roe*, CV98-6147-WJR(AJW).[1]

On December 16, 1998, the Court issued a memorandum and order explaining that three of petitioner's eight claims were not exhausted. Petitioner was allowed to choose between withdrawing the unexhausted claims or dismissing the petition in order to present the unexhausted claims to the state courts before pursuing federal habeas relief. The memorandum and order notified petitioner that if he elected to dismiss the petition, any future federal petition would be subject to the one year limitation period set forth in the AEDPA and that the time during which a federal petition such as his was pending probably would not toll the limitation period.[2] [Motion to Dismiss, Ex. G at 203). In response to the memorandum and order, petitioner-filed a "Motion for Dismissal Without Prejudice to Exhaust Claims."

On January 11, 1999, a report and recommendation was issued. It recommended that petitioner's request for voluntary dismissal be granted. The report and recommendation reiterated that the one year statute of limitation would apply to any future federal petition. Further, the Court made clear that although the limitation period was tolled while petitioner had a properly filed petition pending in state court, it probably was not tolled while his federal petition was pending. The Court told petitioner

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[1] The Court takes judicial notice of official court files. *See* Fed. R. Civ. P. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

[2] The Court said "probably" because that issue was not definitively resolved until the Supreme Court's decision in *Duncan v. Walker*, 533 U.S. 167, 174-175 (2001).

that he "should proceed with his state court petitions without delay," and warned that "[e]ven assuming that he does so, however, there is no guarantee that any future federal petition will not be time-barred. On the present record, the amount of the limitation period that already has expired is unclear." [Report and Recommendation issued January 11, 1999 at 3-4 n.3]. Petitioner did not file objections to the report and recommendation, and on February 18, 1999, judgment was entered dismissing the petition without prejudice.

Petitioner did nothing to exhaust his state remedies for more than fourteen months. Then, on April 19, 2000, he filed a habeas petition in the California Court of Appeal. [Motion to Dismiss, Ex. J]. The petition was denied on May 9, 2000. [Motion to Dismiss, Ex. K].

Petitioner next filed a habeas petition in the California Supreme Court, which was denied on August 30, 2000. [Motion to Dismiss, Exs. L &M].

On September 18, 2000, petitioner filed his second federal habeas corpus petition in this Court.[3] Respondent filed a motion to dismiss the petition, arguing that it was barred by the AEDPA's one year period of limitation. Petitioner filed several replies. On November 29, 2001, judgment was entered dismissing the petition as untimely.

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[3] Although the petition was filed by the Clerk's Office on October 20, 2000, petitioner is entitled to the benefit of the "mailbox rule," pursuant to which a habeas petition filed in state or federal court is deemed filed on the date on which petitioner signed the petition and presumably handed it to the proper prison official for mailing. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that a pro se prisoner's pleading is deemed filed at the moment it is delivered to prison authorities for forwarding to the district court).

The Ninth Circuit reversed the judgment and remanded the case, explaining that, at the time it dismissed the petition, this Court did not have the benefit of subsequent Ninth Circuit authority, and instructing this Court to determine whether the petition should be construed as timely in light of the following decisions: *Ford v. Hubbard*, 330 F.3d 1086, 1100 (9th Cir. 2003) (concluding that the district court erred when it failed to inform a pro se petitioner that he would be time-barred upon returning to federal court with exhausted claims), *vacated*, 542 U.S. 225 (2004); *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir.) (deciding that "the district court must consider the alternative of staying the petition after dismissal of the unexhausted claims, in order to permit Petitioner to exhaust those claims and then add them by amendment to his stayed petition,"); cert. denied, 538 U.S. 1042 (2003); *Smith v. Ratelle*, 323 F.3d 813, 819 (9th Cir. 2003) (determining that a district court's erroneous dismissal of a mixed habeas petition amounted to "extraordinary circumstances" warranting equitable tolling of the limitation period), *cert. denied*, 124 S.Ct. 2904 (2004); and *Guillory v. Roe*, 329 F.3d 1015, 1018 (9th Cir.) (stating that "the relevant measure of diligence is how quickly a petitioner sought to exhaust the claims dismissed as unexhausted, and how quickly he returned to federal court after doing so."), *cert. denied*, 540 U.S. 974 (2003).

The parties filed supplemental briefs addressing these cases as well as subsequent Supreme Court authority. For the following reasons, petitioner's second federal habeas corpus petition should be dismissed as untimely.

Discussion

The AEDPA amended section 2244(d) to impose a one-year statute of limitations for the filing of habeas corpus petitions by state prisoners. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or

> claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1) & (2).

Pursuant to subsection (A), the one-year limitation period began to run on the date on which judgment became final. 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final on October 28, 1997 – ninety days after the California Supreme Court denied his petition for review, when the time for seeking certiorari in the United States Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157, 1158-1159 (9th Cir. 1999). Thus, petitioner had until October 28, 1998 within which to file a federal habeas corpus petition. *See Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001); *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 & 523 U.S. 1061 (1998), *overruled on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1060 (1999). Petitioner, however, did not file his second federal habeas corpus petition until September 18, 2000, nearly two years after the limitation period had expired. Unless petitioner is entitled to tolling, his current petition is untimely.

As discussed, the period of limitation does not run so long as a properly filed state application for post-conviction relief is pending. 28 U.S.C. § 2244(d)(2). Petitioner, however, did not have any application for relief pending in state court at any time prior to the expiration of the limitation period. The first state petition filed by petitioner was not filed until April 19, 2000, long after the limitation period had run out. *See* 28 U.S.C. § 2244(d)(2);

Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.) (explaining that "section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"), *cert. denied*, 540 U.S. 924 (2003); *Rashid v. Kuhlmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) (explaining that section 2244(d)(2) cannot "revive" the limitation period, it can only "pause a clock that has not yet fully run. Once the limitation period is expired, collateral petitions can no longer serve to avoid a statute of limitation. . . ."). As a result, neither of petitioner's state habeas petitions tolled the limitation period.

Further, petitioner's prior federal petition did not toll the limitation period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 174-175 (2001).

The effect of petitioner's prior federal habeas petition

If a district court has improperly dismissed a timely federal petition, then under certain circumstances, a later petition may be deemed timely, either by application of equitable tolling principles or by the rules regarding relation back of amendments. *See* Fed.R.Civ.P. 15. It is this line of cases that the Ninth Circuit instructed this Court to consider on remand.

Ford

After this Court's dismissal of the petition as untimely, the Ninth Circuit decided *Ford*, holding that a district court presented with a mixed habeas petition must inform a pro se petitioner that it could consider a motion to stay only if the petitioner opted to amend his or her petition and dismiss unexhausted claims. *Ford*, 330 F.3d

at 1099. In addition, the Ninth Circuit held that a district court must, tell a pro se petitioner if, on the face of a petition, it appears to the court that all of his or her claims would be time-barred if he or she chose to dismiss the petition and return to state court to exhaust the unexhausted claims. *Ford*, 330 F.3d at 1099-1100. If the district court fails to provide a petitioner with that advice, the Ninth Circuit ruled, then dismissal of a timely mixed petition is improper. In such a case, a petitioner's subsequent petition, filed without unreasonable delay, may "relate back" to the improperly dismissed first petition. *Ford*, 330 F.3d at 1102. The Ninth Circuit also explained that the later petition related back to the first petition in *Ford* because the district court had affirmatively misled the petitioner by stating that the dismissal of his mixed petition was "without prejudice" even though the AEDPA's one-year statute of limitation already had expired while the court was considering the first petition. *Ford*, 330 F.3d at 1100-1102 & n.8.

In the meantime, however, the Supreme Court has vacated *Ford*, and rejected the Ninth Circuit's requirement that a district court inform a petitioner about the stay and abeyance procedure. As the Supreme Court explained, district courts have "no obligation to act as counsel or paralegal." *Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2446 (2004). The Supreme Court also held that a district court is not required to inform a petitioner that the statute of limitation would bar a future federal petition if he or she chose to dismiss the petition without prejudice to return to state court and exhaust state remedies. Requiring such a warning, it said, "would force upon district judges the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation

and calculation of whether the AEDPA limitations period has already run or will have run by the time the petitioner returns to federal court." *Pliler*, 124 S.Ct. at 2446. Nevertheless, the Supreme Court remanded the case based upon the Ninth Circuit's "concern that (the habeas petitioner) had been affirmatively misled quite apart from the District Court's failure to give the two warnings." *Pliler*, 124 S.Ct. at 2447.

Based upon *Pliler*, this Court's dismissal of petitioner's first petition, which contained both exhausted and unexhausted claims, was proper. In particular, it was not error to dismiss petitioner's mixed petition without informing him that he could ask that the petition be stayed and without telling him that a future federal petition would be barred by the statute of limitation. After *Pliler*, district courts have no obligation to give habeas petitioners that sort of legal advice.

Nothing in this Court's orders affirmatively misled petitioner. The Court provided petitioner with the option of withdrawing his unexhausted claims and proceeding on the merits of the remaining claims presented in his timely-filed first petition, as it was obligated to do. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001). The Court also warned petitioner that the statute of limitation would apply to any future federal petition and that it probably was not tolled during the time his first federal petition was pending. Although he was provided the opportunity to dismiss his unexhausted claims, and warned of the possible consequences of dismissing the entire petition, petitioner elected to dismiss the petition. Furthermore, the report and recommendation expressly stated that the Court could not determine how much of the limitation period, if any,

remained, and cautioned, petitioner that even if he returned to state court without delay, "there is no guarantee that any future federal petition will not be time-barred." This Court, then, did not tell petitioner that he assuredly would be allowed to pursue federal habeas relief after exhausting his state remedies. To the contrary, the Court warned petitioner about the statute of limitation and its potentially preclusive effect. Requiring district courts to do more in order to avoid affirmatively misleading petitioners would essentially force district courts to conduct the sort of investigation and give the type of advice that the Supreme Court has held they are not obligated to provide. *See Pliler*, 124 S. Ct. at 2446. Finally, the mere fact that the Court used the words "without prejudice," cannot have affirmatively mislead petitioner. The Court was required to dismiss the petition without prejudice, because the dismissal was not based upon the merits. *See generally* Fed.R.Civ.P.41(a); *Slack v. McDaniel*, 529 U.S. 473, 485-487 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-645 (1998).[4] Simply acknowledging that fact was not misleading.

Even if the order dismissing the petition "without prejudice" could be viewed as having "affirmatively misled"

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[4] Dismissing a petition "without prejudice" based upon a procedural deficiency cannot reasonably be construed as suggesting to a petitioner that he or she is guaranteed federal review of the merits of his or her claims in a future petition. Not only might the statute of limitation expire, but other unforeseeable events might preclude federal review, such as the expiration of the petitioner's sentence. *See Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam) (a petitioner may not challenge a conviction where the sentence imposed has fully expired at the time the habeas petition is filed). To require a district court to speculate about all of the possibilities and advise petitioner concerning them would be impractical and inconsistent with *Pliler*.

petitioner because after the presentation of additional facts from both parties in this case, and with the benefit of hindsight, it is now apparent that at the time the Court provided petitioner with his options, the limitation period already had run, his current petition still is not timely because petitioner did not return to state court to exhaust his unexhausted claims and file his second petition without unreasonable delay. *See Ford*, 330 F.3d at 1102; *see also Guillory* (stating that "the relevant measure of diligence is how quickly a petitioner sought to exhaust the claims dismissed as unexhausted, and how quickly he returned to federal court after doing so," and denying equitable tolling where petitioner took seven months to return to federal court following the state court's final decision); *Kelly*, 315 F.3d at 1071 (stating that 30 days is a reasonable time for a petitioner to return to federal court following final action by the state courts). Petitioner was notified in the memorandum and order filed on December 16, 1998, that three of his claims were not exhausted.[5] Although he then elected to dismiss the petition to exhaust those claims, petitioner took no action to do so until April 19, 2000, the date on which he alleges he handed his first state petition to prison officials for mailing. [*See* Petitioner's Supplemental Brief, filed September 13, 2004 at 9].[6] Thus, petitioner allowed sixteen months – longer than the one year limitation period of which he was warned – to

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[5] Arguably, petitioner was put on notice of his failure to exhaust state remedies as early as October 30, 1998, when respondent filed a motion to dismiss the petition on the ground.

[6] That petition actually was filed on April 27, 2000.

pass before attempting to exhaust claims that he knew were unexhausted.[7]

Kelly

In *Kelly*, the Ninth Circuit remanded a case to the district court with instructions to permit the petitioner to withdraw his two unexhausted claims and proceed on the merits of the remaining exhausted claims. Relying upon Ford, the court also directed the district court to consider the alternative of staying the petition after dismissal of unexhausted claims so that the petitioner could exhaust those claims and then add them back to his stayed petition by amendment. *Kelly*, 315 F.3d at 1070-1071. Further, the Ninth Circuit indicated that a district court generally must exercise its discretion to grant a stay if dismissal of the petition "will render it unlikely or impossible for the petitioner to return to federal within the one-year limitation period imposed by the [AEDPA]." *Kelly*, 315 F.3d at 1070.

There is reason to doubt the continuing viability of *Kelly's* holding that a district court must raise the possibility of a stay *sua sponte* and then grant a stay whenever the statute of limitation might expire before the petitioner can return to federal court. First, it is difficult to reconcile *Kelly's* requirement that the court consider a stay based on the effect of the statute of limitation with the holding in

[7] Petitioner's allegations that he is entitled to equitable tolling because he was bitten on the chin, lost access to his legal material, and attempted to confirm that a petition was filed in the California Supreme Court are discussed below. Even granting petitioner the 69 days he believes he is entitled to based upon these events, that leaves more than a year when petitioner did nothing to exhaust his state remedies.

Pliler that district courts are not required to perform a statute of limitation analysis after determining that a petition is mixed. Furthermore, since *Kelly*, the Supreme Court also has held that district courts may stay mixed petitions only in "limited circumstances." *Rhines v. Weber*, 125 S.Ct. 1528, 1534 (2005). Now a stay is warranted only if (1) the petitioner shows good cause for his or her failure to have exhausted the claims earlier, (2) there is no evidence that the petitioner's delay was a dilatory tactic, and (3) the unexhausted claims are not "clearly meritless." *Rhines*, 125 S.Ct. at 1535. The Supreme Court also explained that even where a stay is granted, district courts must place reasonable time limits on a petitioner's "trip to state court and back." *Rhines*, 125 S.Ct. at 1534.

In light of *Pliler*, it is not clear that a district court is required to raise the possibility of a stay *sua sponte*.[8] If this is so, then this Court's failure to do that while petitioner's first federal habeas petition was pending was not improper.

Furthermore, in light of *Rhines*, it is not clear that the Court's failure to consider staying the first federal petition

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[8] Assuming that *Kelly* remains good law, *Kelly* and *Pliler* might be reconciled by a rule that while the district court is not required to inform a petitioner about the withdrawal and abeyance procedure, it must nevertheless *consider* whether a stay is warranted even when the petitioner does not request one. That would make no sense, however, because it would mean that a district court would have an obligation to stay the petition – something that many petitioners would not want – without informing the petitioner that a stay was an option and allowing him or her to decide how to proceed. It also would mean that a district court would have to perform a statute of limitation analysis, because there would be no point in staying a petition rather than simply dismissing it unless the district court knew that the statute of limitation might have expired.

harmed petitioner because it does not appear that the "limited circumstances" discussed in *Rhines* were present in petitioner's case. In particular, nothing suggests that petitioner had good cause for failing to exhaust the three unexhausted claims before filing his first federal petition. Nevertheless, even if this Court erred by failing to consider a stay in the first instance, petitioner's second federal petition would still be untimely based upon petitioner's long delay in returning to state court to exhaust his state remedies.

As the Supreme Court explained in *Rhines*,

> [e]ven where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. . . . Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. *See, e.g., Zarvela* [*v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001)] ("[District courts] should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed").

Rhines, 125 S.Ct. at 1535.

Here, petitioner waited fourteen months after the date on which his petition was dismissed (and sixteen months after the date on which the Court informed him that three of his claims had not been exhausted) before attempting to

present those claims to a state court. He dragged his feet even though this Court warned him about the twelve month limitation period. In addition, nothing suggests that petitioner would have been entitled to a stay for the length of time he let pass before exhausting his state remedies and returning to this Court. Therefore, petitioner did not pursue his state court remedies with reasonable diligence.

Smith and Guillory

In *Smith*, the Ninth Circuit held that when a district court improperly dismisses a mixed petition without providing the petitioner with the option to dismiss the unexhausted claims and proceed on the basis of the exhausted claims or with the option to hold the petition in abeyance, the dismissal amounts to "extraordinary circumstances" warranting equitable tolling. *Smith*, 323 F.3d at 819.

In *Guillory*, the Ninth Circuit found that the district court erred by denying Guillory's motion to strike the unexhausted portions of his petition as an alternative to suffering dismissal. *Guillory*, 329 F.3d at 1017-1018. Nevertheless, the Ninth Circuit rejected Guillory's contention that his second federal petition should be deemed timely based upon the erroneous dismissal of his first federal petition. As the Ninth Circuit explained:

> Although Guillory correctly points out that he was not sitting on his rights during the three-year interval between his federal petitions, the relevant measure of diligence is how quickly a petitioner sought to exhaust the claims dismissed as unexhausted, and how quickly he returned to federal court after doing so. Guillory

> took twenty-seven months to present the relevant claims to the California Supreme Court, and seven months after that court's decision to return to federal court. Given his lack of diligence in exhausting his claims, Guillory is not entitled to equitable tolling. . . . Were we to apply *Tillema*, as Guillory suggests, a district court's failure to permit a petitioner to strike unexhausted claims from his petition would toll the statute of limitations indefinitely. We reject such a rule as not only contrary to our previous cases requiring a petitioner to proceed with reasonable diligence, but also inconsistent with AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226 (2002).

Guillory, 329 F.3d at 1018.

As discussed above, this Court's dismissal of petitioner's mixed petition was not improper under current law as articulated by the Supreme Court. This Court was not required to provide advisements other than those given, it was not required to perform a statute of limitation analysis so that it could inform petitioner about when the limitation period had or would run, it did not affirmatively mislead petitioner, and petitioner was not entitled to a stay. Unlike the order at issue in *Kelly*, this Court did provide petitioner with the option of withdrawing his unexhausted claims and asking that the exhausted claims be decided on their merits, but petitioner chose not to do so. Accordingly, the dismissal was not improper and did not amount to an "extraordinary circumstance beyond petitioner's control" warranting equitable tolling. *Cf. Smith*, 323 F.3d at 819.

Even if this Court's dismissal was improper, as in *Guillory*, petitioner's failure to diligently exhaust his claims and return to federal court precludes equitable tolling. *Guillory*, 329 F.3d at 1018. *see also Valverde v. Stinson*, 224 F.3d 129, 134 (2nd Cir. 2000) ("if the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken"); *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003) (citing *Valverde*).

Equitable Tolling

The AEDPA's statute of limitation may be equitably tolled upon a showing of "extraordinary circumstances." *Kelly*, 163 F.3d at 541; *Beeler*, 128 F.3d at 1288-1289. "Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Beeler*, 128 F.3d at 1288-89. The equitable tolling doctrine has been applied sparingly. *See Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (stating a general rule that equitable tolling applies when the defendant's wrongful conduct prevents the plaintiff from asserting a claim or when it is impossible for the plaintiff to file on time due to extraordinary circumstances beyond his control), *cert. denied*, 522 U.S. 814 (1997). It is properly invoked only "[w]hen external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim. . . ." *Miles*, 187 F.3d at 1007.

Petitioner makes the following allegations in support of his argument that he is entitled to equitable tolling:

1. On April 12, 1999, petitioner was bitten on the chin. He contends that he should be entitled to 45 days of tolling for "trauma and healing." [Petitioner's Supplemental Brief at 3].

2. Petitioner was deprived of all property, including "legal work" from April 12, 1999 to April 29, 1999, a total of 16 days (which overlap with the days petitioner seeks tolling for his medical condition).

3. Petitioner filed a request in the California Supreme court to "confirm" that he had filed a habeas petition. The first letter was filed on January 1, 2000, and petitioner was notified on January 15, 2000 that nothing had been filed in his name. Thus petitioner believes he should be entitled to 15 days of equitable tolling.

4. On April 9, 2000, petitioner filed a second request in the California Supreme Court seeking confirmation that he had filed a habeas petition. On April 18, he received a letter informing that no petition had been filed. Accordingly, petitioner seeks an additional 9 days of tolling. [Petitioner's Supplemental Brief at 3].[9]

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[9] Petitioner lists other events which he contends count as "tolling," but these events are related to the issue of statutory tolling. For example, petitioner argues that he did not receive notice of any court ruling for at least five days after that ruling was filed, and discusses the dates on which he mailed his state petitions. [Petitioner's Supplemental Brief at 3-4].

(Continued on following page)

Most of petitioner's allegations are insufficient to warrant equitable tolling. For example, there is no explanation why petitioner's chin injury, even if it required antibiotics as petitioner alleges, rendered him unable to prepare his state habeas petition, especially in light of the fact that he already had framed his claims for relief in his first federal petition. In addition, it is not evident how petitioner's requests for information from the California Supreme Court should equitably toll the limitation period. On the other hand, petitioner's allegation that he was denied his legal materials could warrant equitable tolling. *See Lott v. Mueller*, 304, F.3d 918, 924 (9th Cir. 2002).

Nevertheless, even granting petitioner the 69 days during which he believes extraordinary circumstances prevented him from filing a petition (45 days for the chin injury and the loss of legal work, 15 days for the first inquiry to the California Supreme Court and 9 days for the second inquiry), petitioner still did nothing for more than a year, even though he knew his claims were not exhausted and was able to frame them (as demonstrated by his raising them in his first federal petition).

Because of petitioner's own lack of diligence, he is not entitled to equitable tolling. *See Miles*, 187 F.3d at 1007 (9th Cir. (1999) (explaining that the doctrine of equitable tolling is properly invoked only "[w]hen external forces, rather than a petitioner's lack, of diligence, account for the failure to file a timely claim. . . .").

These allegations are not relevant to an equitable tolling analysis, so the Court does not discuss them.

The Court also does not address allegations made in petitioner's second supplemental brief concerning the merits of the petition.

Recommendation

It is recommended that the petition be dismissed as untimely.

Dated: 5.9.2005

/s/ Andrew J. Wistrich
ANDREW J. WISTRICH
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RICHARD KLEINHAMMER,	**No. CV 00-11179 WJR (AJW)**
Petitioner,	**ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**
v.	
ERNEST ROE, WARDEN,	
Respondent.	**(Filed Jun. 2, 2005)**

Pursuant to 28 U.S.C. § 636(b)(1)(C), the court has reviewed the entire record in this action, the Report and Recommendation of Magistrate Judge ("Report), and petitioner's objections. The Court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a *de novo* determination of the portions to which objections were directed.

DATED: 6-1-05

/s/ William J. Rea
William J. Rea
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RICHARD KLEINHAMMER,	)	
Petitioner,	)	**No. CV 00-11179-WJR (AJW)**
v.	)	**JUDGMENT**
ERNEST ROE, Warden,	)	**(Filed Jun. 2, 2005)**
Respondent.	)	

It is hereby adjudged that the petition for a writ of a habeas corpus is dismissed as untimely.

Dated: 6-1-05

/s/ William J. Rea
William J. Rea
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD WILLIAM KLEINHAMMER, Petitioner-Appellant, v. ERNEST C. ROE, Warden, California State Prison, Respondent-Appellee.	No. 05-55991 D.C. No. CV-00-11179-WJR Central District of California, Los Angeles ORDER (Filed Oct. 24, 2005)

Before: WARDLAW and TALLMAN, Circuit Judges.

Appellant's "Petition for Rehearing" is construed as a motion for reconsideration of the denial of appellant's request for a certificate of appealability. So construed, the motion is denied. No further filings shall be accepted in this closed case.

Richard Kleinhamer
J-50057
CSP LAC
P.O. Box 8457
Lancaster, CA 93539

In pro per

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD KLEINHAMMER Petitioner v. ERNEST ROE, WARDEN Respondent	Case No. CV-00-11179-WJR(AJW) NOTICE OF APPEAL (Filed Jun. 17, 2005)

Notice is hereby given that Richard Kleinhammer petitioner, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the letter (received June 10, 2005), Final Judgment June 2, 2005 dismissed as untimely; previously November 28, 2001 dismissed as untimely and prior February 18, 1999 dismissed without prejudice to exhaust state remedies, original 1998 case no. CV 98-6147-WJR (AJW).

Dated: June 14, 2005

/s/ Richard Kleinhammer
RICHARD KLEINHAMMER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD KLEINHAMMER, Petitioner, vs. ERNEST ROE, Warden, Respondent.	CASE No. CV 00-11179 WJR (AJW) ORDER RE: CERTIFICATE OF APPEALABILITY (Filed JUN. 24, 2005)

On June 15, 2005, petitioner filed a document entitled "Notice of Appeal and Application for Certificate of Appealability," pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is **GRANTED.** The specific issue(s) satisfy § 2253(c)(2) as follows:

_____

_____

_____

☒ The Certificate of Appealability is **DENIED** for the following reason(s):

☒ There has been no substantial showing of the denial of a constitutional right.

☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: 6-23-05 /s/ William J. Rea
William J. Rea
United States District Judge

CV-79 (07-97) ORDER RE: CERTIFICATE OF APPEALABILITY

Richard Kleinhamer
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CSP LAC
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In pro per

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD KLEINHAMMER Petitioner v. ERNEST ROE, WARDEN Respondent	Case No. CV-00-11179-WJR(AJW) MOTION FOR REHEARING/ RECONSIDERATION AND CERTIFICATE OF APPEALABILITY

Petitioner alleges District Court failed to consider

1) the May 31, 2005 timely [illegible] Exhibit A) Motion Supplemental objection to Report and Recommendation;

2) hold an evidentiary hearing under 28 U.S.C. § 2254 or other hearing standard regarding newly discovered evidence particularly prosecution key witness willingness to commit perjury – Superior Court 2004 Family Court – undercutting the reliability of the proof of guilt *Corriger v. Stewart*, 132 F.2d 463, 477 (9th Cir. 1997). The newly discovered could be similarly named newly developed as described in *Harris v. Pulley*, 885 F.2d 1354, 1370-71; 28 U.S.C. § 2244(b)(2)(B).

Notice: Court return of attached Exhibit "A" required petitioner to notify respondent May 31, 2005 Motion was not accepted for filing.

3) The petitioner's expressing in 1998 the procedurally barred claim appears to require a court to "exercise discretion in each case to decide whether the Administration of Justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Granberry v. Green*, 481 U.S. 129, 107 S.Ct. 1671 (1987). Instead the option of return to state court without any purported federal time limit over state court habeas or new rule regarding 30 day stay limit "reasonable time limits on a petitioners trip to state court and back." *Rhines v. Weber*, 125 S.Ct. 1528, 1534 (2005).

4) Petitioner alleged counsel excusable neglect in direct appeal where no reason exist to leave out transcript page in argument pressed, if existed court of appeals didn't believe it from comments in judgment, but does exist sharing prejudicial (evidentiary credibility error RT 1181. *See Tomayo-Reyes v. Keeny*, 926 F.2d 1492, 1501-1502 (9th Cir. 1991)). Another part of delay was attributed to drafting a more complete habeas describing facts of the case, ultimately not filed in return to state court because of belief only originals could be filed, those timely-filed in federal court – return option given, 1999.

5) In the interest of justice.

5.5 Reraise prior objections to untimely dismissal and rehearing/certificate of appealability argument.

6. Prior notice under rule 15(c) return back to original 1998 petition has not been appropriately applied under circumstances of petitioners dismissal.

7. Cause and prejudice from state impediments from failure to hold welfare file evidentiary hearing or produce sealed [illegible].

I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct.

Dated: June 14, 2005 /s/ Richard Kleinhammer
RICHARD KLEINHAMMER

EXHIBIT A

Richard Kleinhammer
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P.O. Box 8457
Lancaster, CA 93539
In pro per

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RICHARD KLEINHAMMER, Petitioner, v. ERNEST ROE, WARDEN, Respondent.	CASE NO. CV 00-11179-WJR(AJW) Petitioner's Supplemental Objection to Report and Recommendation of Magistrate Judge

Petitioner is unable to obtain a law book containing *Rhines v. Weber*, 125 S.Ct. 1528 (2005) as the Library is missing volume 12 of the supplement of Supreme Court as of May 30, 2005.[1]

However in reviewing *Carey v. Safford*, 536 U.S. 214, 226, 220, 222 (2002) California original Petition of Habeas Corpus is not considered to undermine encouraging prompt filing in Federal Court and forces Federal Courts to hear state claims. In this case, petitioner's appellate counsel Clifford Gardner informed petitioner that there was no time limit on filing Writ of Habeas Corpus, as *Carey v. Safford* describes.

In regards to the 30 day stay under *Rhines v. Weber* petitioner initially alleged excuseable neglect of appellate counsel and other claims to satisfy good cause 125 S.Ct. 1528, 1534 (2005). Further the properly stayed obeyance petition occurs when no state habeas is pending. *Healy v. Dipaob*, 981 F.Supp. 705, 707 (D. Mass 1997).

The original habeas in that case filed in 1997 following the 1981 conviction, but violated for 1996 AEDPA enactment.

The time after original petition is filed is raised as a point of what seems to be when Statute of Limitations would begin, but has been subsequently, ruled otherwise.

In another case *Stewart v. Martinez-Villeral*, 118 S.Ct. 1618, 1619 subsequent petition is not second or successive.

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[1] Attorney [illegible] never received a handwritten copy of this motion.

Respectfully submitted,

I declare under the penalty of perjury under the laws of the United States the foregoing is true and correct.

DATED: MAY 31, 2005 /s/ Richard Kleinhammer
RICHARD KLEINHAMMER

PROOF OF SERVICE BY MAIL

I declare that: I am a resident of Lancaster, California. I am over the age of 18 years and am/am not a party to the within entitled cause. My address is California State Prison, Los Angeles County, ~~44750 60th Street West~~ P.O. Box 8457, Lancaster, California ~~93536-7619~~ 93539.

On JUNE 14, 2005, I served the attached

Document 1 NOTICE OF APPEAL
Document 2 MOTION FOR REHEARING/RECONSIDERATION AND CERTIFICATE OF APPEALABILITY

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail by delivering to prison officials at Lancaster, California, addressed as follows:

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK
312 N. SPRING, RM G-8
LOS ANGELES, CA 90012

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct. Executed on JUNE 14, 2005, at Lancaster, California.

/s/ Richard Kleinhammer
RICHARD KLEINHAMMER
J-50057

California State Prison, Los Angeles County
~~44750 60th Street West~~ P.O. Box 8457
Lancaster, California ~~93536-7619~~ 93539

Richard Kleinhammer
J-50057
GSP LAC
P.O. Box 8457
Lancaster, CA 93539
In pro per

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RICHARD KLEINHAMMER, Petitioner-Appellant, vs. ERNEST C. ROE, Warden, California State Prison, Respondent-Appellee	NO. 05-55991 PETITION FOR REHEARING (Filed SEP. 26, 2005)

TO THE HONORABLE JUDGES
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

Richard Kleinhammer petitions this honorable court for a rehearing based on the following facts:

On September 09, 2005, this court denied the Certificate of Appealability (28 U.S.C. § 2253(c)(2)). Petitioner received the Denial September 14, 2005.

Petitioner request [sic] the court grant a rehearing FRAP 40 or en banc FRAP 35. The request for rehearing requires petitioner establish *fact or low overlooked* or *misinterpreted*, court error (Fed. R. App. P. 40(a)(2), as related to issuance of Certificate of Appealability. (COA) 28 U.S.C. § 2253; Fed. R. App. P. 22 requiring,

"Substantial Showing of The *Denial of Constitutional Right*," As Follows:

Argument I

Petitioner was denied First Amendment Right of access to court [and due process of Fourteenth and Fifth Amendment] A-Library Impediment; B-Rejected Motion; C-Appointment of Counsel; D-State Impediment to legal files (work)

Argument II

Petitioner was denied Fourteenth [and Fifth] Amendment Right to Habeas Corpus and COA[s] [and 5th and 6th Amendment Right to Present Evidence Defense, fair hearing, hearing etc.] A-Inconsistent Verdict; B-Appointment of Counsel (Dist. Ct. and Ninth Circuit); C-Inconsistent Verdict; D-Newly Discovered Evidence; E-Denial of Extension of Time; F-Judicial or Prosecutor Misconduct; G-Denied Appointment of Counsel; H-Court Rulings [1-State Impediment, 2-Legal Principle, 3-Erroneous Dismissal, 4-Denied Extension of Time overlooked (Ninth Circuit), 5-Missing Mail, 6-Temporary lost mail, 7-Presumption of correctness – due process – abuse of discretion – access to court in two dismissals, 8-Appointment of counsel. I-Actual Factual Innocence; J-Miscarriage of Justice; K-In interest of justice; L-Time Constraints.

[See timelines *Hall v. Scott* 292 F.3d 1264, 1268, (10th Cir. 2002). This case was meant to be cited on Page 17 herein but ran out of room.

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(Please see next page Chronology)

CHRONOLOGY

1997, July –	Cal. Supreme Court denied Direct Appeal
1998, July –	Original Habeas Filed in Dist. Ct. No. CV 98-6147 WJR(AJW) that family-parents typed and copied.
1998-1999 Feb.	(a) *Procedural bar* described by Petitioner Acknowledged by Dist. Court in report and recommendation.
	(b) Dist. Ct. gave two options 1) dismiss on exhausted and proceed (2) return to state to exhaust remedies petitioner elected to return to state.
1999 Feb. –	Dist. Court dismissed Habeas (98-6147) without Prejudice (Exhaustion).
1999 Feb.-Oct/Nov.	Family-parents assist preparation and copying Habeas.
1999 April	Petitioner injured – bitten on chin (2 On [illegible] and personal property confiscated – (legal work).

1999 Oct./Nov. –	Petitioner understood parents mailed Habeas to State Court, but none arrived.
2000 Jan./April –	Two letters, one in January, one in April that Cal. Supreme Court did not receive Habeas.
2000 April –	Habeas filed in State Court of Appeals
2000 –	Habeas filed in State Supreme Court
2000 October 20 –	Habeas filed in District Court (Federal).
2001 November 28 –	Habeas Dismissed by Dist. Court.
2002 January 15 –	COA denied by Dist. Court.
2002 January 24	
2002 January 28 –	Appeal Ninth Circuit (02-55-139)
	Vacated and Remanded by Ninth Circuit
2005 June 2 –	Remand Dismissed by District Court
2005 June 24 –	COA denied by District Court
2005 September 9 –	COA denied by Court of Appeal for Ninth Circuit
2005 September –	Petition Motion for Rehearing

FACTS (Truncated Version)

The original July 1998 timely filed habeas corpus CV 98-6147 in Federal Court followed exhaustion of Direct State Appeal, ending July 1997. The District Court (Dist. Ct.) *dismissed* the 1998 habeas *in February 1999* after

acknowledging petitioners issue (motion, of procedural bar in the 1998-1999 report and recommendation.

After remand in 2005 the Dist. Ct. applied a 2005 case espousing that petitioner's case facts did not show good cause for 30 day stay. Thus no 30 day would or could have been obtained per the ruling, yet the court dismissed the habeas when it was time barred under ADEPA 1 year *Statute of Limitations* (*as of October, 1998*) and knowledge of procedural bar, to exhaust state remedies. The Dist. Ct. gave petitioner a option to exhaust state remedies without regard to any return being barred by statute of limitations.

Dist. Ct. is not required [(per *2005* case description in report and recommendation) in case alleged to overrule Ford in U.S. Supreme Court on untimeliness] to engage in fact finding. In the record of petitioner case, both 1998 habeas application and 1998-99 report and recommendation procedures bar acknowledge as raised required no further factual background to determine petition should not be dismissed. The application shows the 1997 July end of direct appeal, when the (19) nineteen month later dismissal occurred February 1999, although timely filed in July 1998. The tolling equitable and Statutory circumstance described by petitioner included use of family for preparation (typing, copying and filing) and the *1998 habeas describes the preparation and processing 2 years* (see 45 page habeas I believe page 29. The factor of inmate run law library and some research would jeopardize safety of petitioner (prison politics), also see *other events* of petitioner bitten April 12, 1999 trauma – 6 months to heal closed and short property hold (e.g. legal work); (b) believed family mailing habeas to state court Oct./Nov. 1999, but never arrived possibly lost mail, which

is unresolved, (not 2005) request to U.S. Postal Service [illegible] Dept. may produce answers), however no Lancaster Postmaster response has been received per earlier request. The Cal. Supreme Court did respond in two letters January and April 2000 about petitioners inquiry to filing/receiving habeas with negative results. In April 2000 petitioner used the habeas in his cell with new cover sheet/signature page and filed in Cal. Court of Appeals.

The return (after State exhaustion) to Dist. Ct. October 20, 2000 resulted in dismissal as untimely filed without any relation back to original petition (of 1998).

The Ninth Circuit Remand under Ford and other cases, again resulted in Dist. Ct. Dismissal as untimely applying. The U.S. Supreme Court New 2005 as overruling Ford's inquiry into background (facts), still not required in petitioner case on fact of record (background). The legal principle remanded included erroneous dismissal *Guillray v. Roe*, 329 F.3d 1015 (9th Cir. 2003) and *Smith v. Rotellee*, 323 F.3d 813 (9th Cir. 2003) etc . . . with appoint counsel case of tolling entire move and other Fed. R. Civ. P. 15(c) relationback asserted. The Dist. Ct. Ford legal principle overruling 2005-case are facts different than petitioners case, petitioner does not have fact gap, in petitioner case facts of erroneous dismissal of record, prior to court ruling, 2001.

The next Dist. Ct. dismissal in 2005, after remand does not consider the factors of timeliness, prior notice, state library impediment, trauma bitten, lost mail etc. . . . Prior to the set deadline the Dist. Ct. was mailed a motion for extension of time (contents) the library didn't have the 2005 case to read, (nor has the other libraries produced a copy to Friday's date (9-19-05)). The Dist. Ct. rejection of

termed-ruling in case nor seriatum motions make sense with contents of Motion, rejected by Dist. Ct. 2005. Petitioner was also unable to shepherdize any 2005 cases per library shepherds, out dated.

Thereafter the Dist. Ct. in 2005 denied the COA. The motion rejected a) about described was included in COA motion, both the Dist. Ct. and Ninth Circuit word denied for COAs of each were informed of the impediment – library. Petitioner has been on lockdown since July 7, 2005 to prevent (9-18-05); Additionally the ASU Library is limited requiring ordering cases to read. Since July 9, 2005 petitioner has been without his legal work (personal property) due to riot at prison (placement in ASU).

Petitioner request counsel in Dist. Ct. (complexity of issues) was denied. Then request in Ninth Circuit with extenuating circumstances of Lockdown, Library impediment, and without possession of legal work, nor have request been met to produce the personal property. No back ordered cases have arrived to date with long since passed habeas dismissals. Dist. Ct. COA denied and Ninth Circuit COA denied September 9, 2005. Appointment of counsel did not occur during this time span.

Dist. Ct. nor Ninth Circuit permitted briefing on the newly discovered evidence claim (gatekeeping exception) alleged in petition-motion and COAs (2004 evidence), it is not mentioned, especially related to timeliness.

Please consider that without my personal property (legal work), less than adequate access to pertinent legal material, Library impediment, and 14 day deadline as to the completeness of this motion for rehearing and prior motion.

ARGUMENT I

Petitioner was denied First Amendment right to access to court and due process (5th and 14th Amendment to U.S. Constitution) as follows:

A. LIBRARY IMPEDIMENT

The Library resources and systemic problems in being unable to provide petitioner, to present date, with 2005 case cited by Dist. Ct., in 5-20-05 Report and Recommendation. The petitioner has experienced further law library inadequacy since riot lock down July 7, 2005 to date with ASU placement, ASU Library contains no case books or up to date title 28, Appeals and writs etc. and requires ordering from another library cases to read (e.g. pertaining to COA, 2005 case etc.) These facts appear to have been overlooked by Dist. Ct. in dismissal, denial of COA, and Ninth Circuit Denial of COA, in rendering their judgments. The timing of these impediments run contemporaneous with dismissals and COAs denials in 2005, amounting to denial of access to court in violation of First Amendment [and Due process review].

B. REJECTED MOTION

Petitioners First Amendment access to court and due process rights habeas corpus and COA were violated by rejection of petitioners Supplemental Objection (extension of time, no access to major 2005 case alleged to order Ford in Dist. Court Report & Recommendation 2005). The motion timely mailed per *Houston v. Lack*, rejected merely because Dist. Ct. ruled prior to receiving the motion. The facts of violation of constitutional right appear to have been overlooked even later in COA's since included as an

exhibit in Dist. Ct. COA and described to Ninth Circuit in COA.

C. APPOINTMENT OF COUNSEL DENIED

In Dist. Ct. and Ninth Circuit Court of Appeal, petitioner was DENIED motions to appoint counsel abridging petitioners (1st Amend) access to court [and (5th & 14th Amend.] Due Process) under the circumstances of impediments. There has been no access to the U.S. ~~Supreme Court Case overruling~~ Supreme Court Case (2005) purportedly overruling Ford and other remand cases *Guillroy, Smith* etc. (page 5 herein), to respond to application of Law (e.g. fact gap) which appears to have been overlooked per denials of appointment of counsel, additionally with respect to complexity of issues, procedural dismissal without adjudicating the merits of Direct Appeals or subsequent exhausted ground (no habeas) (all noted to court 1998).

D. STATE IMPEDIMENT TO LEGAL FILES (PROPERTY)

Petitioners First Amendment access to court [and Due Process] in Habeas (removal/dismissal) and COAs was violated by State Impediment to Legal Materials. State prison officials have maintained possession of petitioner's legal work since July 9, 2005 to (date September 19, 2005) present.

ARGUMENT II

Court denied petitioner right to Fourteenth [and Fifth] Amendment due process whether law or fact overlooked or

misinterpreted. [also see 5th, 6th Amend. evidence, defense, [illegible]; actual factual innocence; newly discovered; hearing 28 U.S.C. 2254(e) or lesser ex parte consideration.

A – INCONSISTENT VERDICTS

District Ct. and Ninth Circuit rulings show Abuse of Discretion (and violate due process) because courts failed to adhere to legal principles articulated in *Rose v. Lundy* or 2005 case overruling *Ford*. The Court misinterpreted law and overlooked facts of record as follows: 2005 case allegedly requires good cause for 30 day stay, which Dist. Ct. ruled petitioner did not have. In that analogy dismissal in 1999 would not be granted (expired limitation period and procedural bar) to exhaust where no stay was available. Although not requiring a look into background – holding asserted – Petitioner's Application 1998 described fact of July 1997 end of Direct Appeal and Motion described prior to dismissal in 1999 to exhaust state remedies. Thus the Court interpretation says if the problem is clear to Court (Factual Background) it can ignore it, a misinterpretation or an overlooking facts continually raised upon 2000 return for exhausting state remedies dismissal or COA Denial.

Petitioners case shows an existence (notice and knowledge) of pertinent factual background precluding dismissal option at the time. These circumstances have been overlooked seriatim (e.g. [illegible]). The dismissal also fails to adhere to the legal principle articulated by U.S. Supreme Court in *Granberry v. Greer*, 481 U.S. 129 (1987) adjudicating in the interest of justice (otherwise result in Miscarriage of Justice, or other qualities frivolous etc.).

B – APPOINTMENT OF COUNSEL

Dist. Ct. and Ninth Circuit Court of Appeals failed to adhere to legal principle in *Strickland v. Washington*, 466 U.S. 668, 698 (198[illegible] whether appointment of counsel denied or 1999 dismissal and either COA District Court and Ninth Circuit erred in legal and factual ruling, denying due process right. A clearly erroneous, denial of appointment of counsel shown under overlooked – misinterpreted circumstances of law library impediment still in effect as well as refusal of state to produce petitioner personal property (legal work), and lastly the issue of sufficient complexity (e.g., record state and federal court, length of record) (See *Dillon v. U.S.*, (9th Cir. 1962) 307 F.2d 445.

C – INCONSISTENT VERDICT

Dist. Ct. 1998-1999 option to i review to state to exhaust remedies [or dismiss – unexhausted] is contrary to legal principle enunciated by District Court in 2005. As applied to petitioner good cause is required for stay (30 day) and is not shown. This overlooked application of fact was carried on in the Ninth Circuit. The verdict – ruling in *Ford* case by Ninth Circuit are inconsistent with ~~rejected factual background inquiry requisite of court~~ requiring the factual background before ruling, to 200 case overruling, it used in remand. At issue in 2005 case are factual background inquiry, not the pertinent facts appearing on face of record (notice) 1998-1999 Dist. Court (Habeas application and procedural bar and option), an erroneous DISMISSAL.

The Ninth Circuit needs to resolve the legal principle of *Ford, Smith, Rotelle* to the extent inconsistent with

2005 case overruling *Ford* (U.S. Supreme Court). Keeping in mind the extent of factual background the Dist. Ct. was aware of at time of DISMISSAL, (AEDPA Expiration). Unless Fed. Rule 15(c) is applied or other tolling in combination with circumstances of petitioners case (e.g. bitten, library impediment, lost mail unresolved, and Cal. Supreme Court letters, dismissals, and COAs).

D – NEWLY DISCOVERED

Newly discovered evidence in 2004 (undermining credibility of key prosecution witness was overlooked by Dist. Ct. and Ninth Circuit Court of Appeals and absent from gatekeeping exception consideration violating petitioner's due process habeas and COA right unmentioned by courts to date. (*Corriger v. Stewart* or ___. Other consideration of the evidence under 28 U.S.C. 2254(e) or lesser ex parte consideration has ~~evidence~~ not been undertaken by the courts to satisfy petitioner due process rights.

E. DENIAL OF EXTENTION [sic] OF TIME

Dist. Ct. denied petitioners (continuance) extention [sic] of time motion by rejecting it, despite timely mailed-filed (under *Houston v. Lack*), violating petitioner due process rights. Motion contents (later filed in COA asserted library impediment (no 2005 case) to responding after access to case. This same impediment was described to Ninth Circuit prior to COA denial, 2005.

F. MISSING?

G – APPOINTMENT OF COUNSEL

Failure to appoint counsel denied petitioner an ability to respond, in considering complexity of issues untimeliness statutory equitable tolling, change in law during remand, new evidence, library impediment – safety issue] or library access violating petitioners due process right. ~~To circumstances~~

H – COURT RULINGS & FRAP 40(a)(2)

Court rulings overlooking or misinterpreting law or facts (FRAP 40(a)(2) and due process rights)

1 – STATE IMPEDIMENT

Statutory 28 U.S.C. 22 ___ – statutory tolling and equitable telling (e.g. *Smith Roitelle*) was erroneously denied Petitioner with *state impediment* [*of inmate run prison law library*] that use *would jeopardize Petitioners Safety* [e.g. charges of conviction ___] requiring petitioner to resort to family outside prison for preparation without prison dissemination of case. The court has misinterpreted or overlooked the safety problem recently a state impediment to library use and other circumstances described herein (e.g. *habeas describes 2 year preparation* and *processing – 1998 prior to dismissal*; bitten, letter. lost mail).

2 – LEGAL PRINCIPLE

Appeals & Dist. Ct. failed to adhere to legal principle in 2005 case permitting stay of 30 days only if good cause shown by since ruled no cause existed for stay without justifying dismissal 1999 where not even a stay could be

obtained. The remand cases of Ninth Circuit toll entire time where dismissal was erroneous as clearly described in not even a short stay would be granted.

3. ERRONEOUS DISMISSAL

Dist. Ct. 1999 erroneous dismissal overlooked – has interpreted fact of Statute of Limitation expired 4 months prior to dismissal as well as procedural bar objection of Petitioner acknowledge by Dist. Ct. 1998-1999. Resulting in dismissal for untimeliness upon return to Federal Ct. District Court misled petition with option to return to state to exhaust, when any subsequent petition was barred by expired Statute of Limitation. (See H-1). Upon return Dist. Ct. Dismissal as untimely and again in 2005 without adjudicating merits of the habeas corpus (direct or newly exhausted, or even 2004 newly discovered). Petitioner constitutional claims in 45 page habeas and application 1998 are meritorious grounds, as petitioner understands the grounds on direct raised by counsel and subsequent habeas grounds, while courts 2001 (approximate) Report and Recommendation says petitioner only raised constitutional ground (e.g. suggest no exception to procedural bar which precludes 1999 dismissal). Erroneous dismissal denied petitioner 1. Due process rights to adjudicate federal habeas. After three dismissals if presumption of correctness as to underlying claim [rather than Mechanical Untimeliness Bar] Petitioners 45 page habeas sufficiently overcomes that presumption, but remained to this point in a shell game sort of speak behind procedure, until two denials equate to on the merits. Thus the Ninth Circuit Court of Appeals should be able to review (*de novo* etc.) the underlying grounds.

4 – EXTENTION [sic] DENIED (See Argument *II E*)

5. MISSING MAIL

Dist. Ct. ignored the missing mail alleged in 1999 as an impediment to timely filing, without ever determining if a prima facie case was alleged, and sufficiency of evidence or effect on timeliness (e.g. see Argument I-A and Argument II H-1 library impediment). The claim remains unaddressed by the courts. (See prior motion by petitioner in Dist. Ct.)

6. TEMPORARILY LOST MAIL

In the Ninth Circuit Petitioner last motion of COA (mailed on September 1, 2005 preceding the September 9 2005 COA Denied) included lost mail requesting briefing schedule/counsel etc. as I recall? The San Francisco [illegible] U.S. postal service department returned the letter without its envelope. 1 question whether the Ninth Circuit received the motion dated September 1 prior to ruling. On COA September 9. Petitioner request any temporary lost mail be considered because of impediment to filings as well September 1 motion where no deadline was set for COA.

7. DISMISSALS AS ADJUDICATION ON THE MERITS

The District Ct. 2001 and 2005 dismissals amount to an adjudication on the merits permitting petitioner to show abuse of discretion or denial of due process related to the underlying constitutional grounds. In addition to the errors described in other arguments ~~whether appointment of Dist. Ct. erred in procedural ruling~~ herein petitioners 45 page habeas 1998-1999, 2000, establish the presumption

of correctness of the two district court dismissals are overcome on underlying constitutional claim. The District Ct. Report and Recommendation following the 2000 resubmitted habeas itself describes the petitioner only raising constitutional claims without passing upon their validity. ~~Petitioners would be denied due process if claims underlying the petition~~ The strength of the habeas constitutional claims are clearly meritorious (see habeas 45 pages and habeas application in record, as petitioner does not have his property).

8. FAILURE TO APPOINT COUNSEL (SEE ARGUMENT I-C AND ARGUMENT – II B AND G HEREIN)

I. ACTUAL FACTUAL INNOCENCE

Petitioner initial in 1998 raised innocence Dist. Court only responded to after 2000 return ~~and~~ claiming inadequate is contrary to *Schlup v. Delo* evidence wrongfully excluded and erroneously admitted. In addition merely credibility undermined is sufficient *Corriger v. Stewart*). In addition, newly discovered evidence in 20054 has been asserted for gatekeeping exception to apply. (Also see docketed motions and extended Table of Contents).

J. MISCARRIAGE OF JUSTICE (Several claims of in underlying habeas and application, and present circumstances no adjudication of underlying ground.

K. IN INTEREST OF JUSTICE, permit review of claims.

L. TIME CONSTRAINT SHORTENING THIS RELEVANT [illegible]

CONCLUSION

Both elements of *Slack v. Daniel*, 529 U.S. 477 (2000) first (1) Juris of reason would find it debatable whether the petition states a valid claim of denial of constitutional right and (2) Jurist of reason would find it debatable whether the district court was correct in its procedural ruling, ID. at 483-484.

Both in Argument I (First Amend-Access) and Argument II (fourteenth due process) depict several constitutional rights denied, from library impediment in habeas and COA, to inconsistent verdict and failure to adhere to principle of law misinterpreted or overlooked along with facts as well, denial of extention [sic] of time. Where the review reaches underlying constitutional claims, petitioners 1998 application and 45 page habeas detail many grounds with support. (No personal property to correctly describe the grounds generally advocate presumption of correctness overcome where claims are denied. (See 1999 or 2000 habeas application and 1998, 2000 45 page habeas. There has been procedural ruling of 1999 (DISMISSAL) to exhaust and continued Dist. Ct. dismissal upon return as untimely without considering the circumstances (herein described overlooked-misinterpreted law or facts, library impediment, bitten, lost mail, newly discovered evidence and much more . . . the procedurally new defect of rejected extension of time, failure to appoint counsel, inadequate library access and legal work (of petitioner) acted merely add to the large group of grounds. Petitioner has been denied on procedural grounds without reaching underlying constitutional claims. Petitioner request the court of appeal grant relief its deems appropriate including petition for rehearing and appointment of counsel.

I declare under the penalty of perjury laws of the United States, the foregoing is true and correct.

DATED: September 19, 2005

RESPECTFULLY SUBMITTED

/s/ Richard Kleinhammer